ZSCHIMMER & SCHWARZ GMBH & CO KG CHEMISCHE FABRIKEN v. PERSONS UNKNOWN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-600-12-2020]
22 DECEMBER 2020

CIVIL PROCEDURE: *Injunction – Proprietary injunction – Application for – Plaintiff victim of cyber fraud and deceived into making payment for legitimate transaction into different bank account under fraudster's control – Whether plaintiff's proprietary interest should be preserved by proprietary injunction – Whether there was serious issue to be tried – Whether balance of convenience in favour of granting injunction – Whether monies should be injuncted pending determination of full writ action – Whether just and convenient to grant proprietary injunction – Whether requirements of O. 29 r. 1(2A) of Rules of Court 2012 met*

CIVIL PROCEDURE: *Injunction – Mareva injunction – Application for – Plaintiff victim of cyber fraud and deceived into making payment for legitimate transaction into a different bank account under fraudster's control – Whether there was good and arguable case that plaintiff wrongly paid out monies under false pretence – Whether defendants had assets within jurisdiction – Whether there was risk of assets being removed before judgment satisfied – Whether requirements of O. 29 r. 1(2A) of Rules of Court 2012 met*

CIVIL PROCEDURE: *Service – Substituted service – Order for substituted service by way of email and advertisement – Grounds for – Whether impracticable to effect personal service on Persons Unknown – Rules of Court 2012, O. 62 r. 5(1)*

CYBER LAW: *Fraud – Push payment fraud – Plaintiff victim of cyber fraud and deceived into making payment for legitimate transaction into different bank account under fraudster's control – Cases involved fake email addresses and fraudster or fraudsters unknown – Whether court could grant interlocutory orders against Persons Unknown*

The plaintiff, a German company and a manufacturer of speciality chemical products, was a victim of a cross-border cyber fraud known as a 'push payment fraud' where the victim is tricked over emails to make a payment for a legitimate transaction into a different bank account under the control of the fraudster. The plaintiff had a business arrangement with its representative company in South Korea, KoWorks, where KoWorks would sell the plaintiff's products and the plaintiff would make commission payment to KoWorks based on the sales. The first defendant, being persons unknown, was a defendant and/or a group of defendants who had infiltrated the email communications between the plaintiff and KoWorks and participated in the fraud to deceive the plaintiff into mistakenly paying the commission into a CIMB bank account in Malaysia in the name of the second

defendant *ie*, Premier Outlook services. The fraud was discovered when KoWorks informed the plaintiff that it had not received any commission payment. Subsequent investigations were then carried out by the plaintiff, Commerzbank AG ('Commerzbank') and the plaintiff's German solicitors. The plaintiff was informed that the plaintiff's monies in Premier Outlook's CIMB account had been fully transferred out. The plaintiff sought two reliefs on an urgent *ex parte* basis *via* a hearing through the e-review platform (i) a proprietary injunction and *Mareva* injunction relief against the defendants; and (ii) substituted service by way of email and advertisement against the fraudster first defendant.

Held (granting plaintiff's prayers):

(1) A proprietary injunction is used to preserve and restrain a defendant from dealing with the assets of the plaintiff or with assets in which the plaintiff has an existing proprietary interest in. The three elements for the grant of a proprietary injunction are (i) that the claimant has shown that there is a serious issue to be tried on the merits; (ii) that the balance of convenience is in favour of granting an injunction; and (iii) that it is just and convenient to grant the injunction. The plaintiff was deceived into paying the plaintiff's monies into the second defendant's CIMB account (in the name of Premier Outlook). The plaintiff was deceived into thinking the plaintiff was paying KoWorks. Applying the case of *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, the plaintiff could assert a constructive trust claim over the monies. There was at least a serious issue to be tried that the plaintiff's proprietary interest should be preserved by this proprietary injunction. The plaintiff was also seeking an account of profits – the profits obtained from the use of the plaintiff's monies. Such profits were said to naturally follow a proprietary claim. The balance of convenience was in favour of the grant of the proprietary injunction. These were the plaintiff's monies that were paid out under a false premise. These monies should be injuncted pending the determination of the full writ action. It was just and convenient to grant the proprietary injunction. (paras 33, 36 & 52-56)

(2) While for a *Mareva* injunction, the three elements are (i) the applicant must show that it has a good and arguable case; (ii) that the defendants have assets within jurisdiction; and (iii) that there is a risk of the assets being removed before judgment could be satisfied. The court could grant parallel reliefs of a proprietary injunction and a *Mareva* freezing injunction. There was a good arguable case that the plaintiff did wrongly pay out the plaintiff's monies into the CIMB bank account under false pretences as the plaintiff was deceived into thinking it was paying the real KoWorks. There was also a good arguable case that the plaintiff was entitled to seek an account of profits against the defendants for any

profits that were obtained through the use of the plaintiff's monies. The second defendant, a Malaysian citizen with a Malaysian residential address, was likely to have assets in the jurisdiction personally and/or by virtue of his business. It was also arguable that the first defendant would also have assets within the jurisdiction. There was already actual dissipation of assets as after the plaintiff's monies were transferred into Premier Outlook's account, these monies had been fully transferred out. Further, when assessing whether there was a risk of assets being removed, a lack of probity and honesty could be determinative in concluding that there was such a risk of dissipation. Here, there was a lack of probity and honesty: fake email addresses were used by the first defendant to deceive KoWorks and the plaintiff. (paras 39, 57 & 62-67)

(3) In cases like the present which involve cyber fraud and fake email addresses, the fraudster or fraudsters are unknown. There is nothing in the Rules of Court 2012 that would prevent the writ of summons and applications from being filed against persons unknown. Thus, the court could grant interlocutory orders against the first defendant – being persons unknown. The plaintiff merely needed to establish a good arguable case for the court to apply the persons unknown jurisdiction. (paras 40 & 50)

(4) The plaintiff had met the requirement under O. 29 r. 1(2A) of the Rules of Court 2012: (i) the affidavit in support sets out the facts giving rise to the claim and the injunctions application (O. 29 r. 1(2A)(a) and (b)); (ii) there was a need to proceed *ex parte*. In light of the defendants' dishonest conduct in directing this fraudulent scheme, notice had not been given to the defendants. Any notice would result in them likely to dissipate their assets or become flight risks to frustrate this application. Further, notice could not be given to the first defendant whose identity was currently unknown (O. 29 r. 1(2A)(c); (iii) concerning any answer that may be given by the second defendant, he may assert that he was unaware that the plaintiffs' monies were paid into Premier Outlook's bank account. However, such denial of knowledge would be untenable given that the second defendant had to be in control of Premier Outlook's bank account as its sole proprietor. Further, it was also common banking practice for banks to contact their clients to verify any large payments being made into their bank accounts, especially in the case of foreign funds (O. 29 r. 1(2A)(d) and (e); (iv) there was no other similar application made to another judge (O. 29 r. 1(2A)(f); and (v) the plaintiff had set out the precise relief in the affidavit in support and the notice of application for the *Mareva* and proprietary injunctions (O. 29 r. 1(2A)(g). (paras 69-72, 76 & 77)

(5) Order 29 r. 1(2BA) of the Rules of Court 2012 provides that an *ex parte* order must be served within seven days of the date of order, however O. 3 r. 5 of the Rules of Court 2012 gives the court the power and

discretion to extend the time of service. Given the difficulty and delay involved in effecting service on the first defendant, this court granted an extension of time to serve the *ex parte* order of the *Mareva* and proprietary injunctions on the defendants within 12 days of the date of order. (para 80)

(6) There were grounds in support of an order for substituted service against the first defendant by way of email and advertisement. It was impracticable to effect personal service on the first defendant being persons unknown. Order 62 r. 5(1) of the Rules of Court 2012 provides that the court may make an order for substituted service of a document requiring personal service if personal service is impracticable. The plaintiff was seeking to effect service on the first defendant through the only known communication method with the first defendant, that was, by sending emails to the two fake email addresses that were used by and in the control of the first defendant. The plaintiff was also seeking to effect service by inserting an advertisement in the local newspaper 'The New Straits Times.' These were the two most practicable methods that would most likely bring the proceedings to the notice of the first defendant. There was nothing to prevent the court from granting an order for substituted service by way of email. (paras 81, 82 & 84-87)

Case(s) referred to:

AA v. Persons Unknown [2020] 4 WLR 35 ***(refd)***

Abdullah Nasser Obaid And Others v. Khalid Abdullah AI-Hezaimi [2018] EWHC 243 (Ch) ***(refd)***

Amixco Asia Pte Ltd v. Bank Negara Indonesia 1946 [1992] 1 SLR 703 ***(refd)***

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 CA ***(refd)***

Arthur Anderson & Co v. lnterfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Cameron v. Liverpool Victoria Insurance Co Ltd [2019] 3 All ER 1 ***(refd)***

Chong Kean Cheong & Anor v. In Ex Hale Sdn Bhd & Ors [2018] 1 LNS 96 HC ***(refd)***

CMOC v. Persons Unknown [2017] EWHC 3599 ***(refd)***

CMOC Sales & Marketing Limited v. Persons Unknown And 30 Others [2018] EWHC 2230 ***(refd)***

English Practice Direction For Mareva And Anton Piller Orders [1994] 4 All ER 52 ***(refd)***

Falcon Private Bank Ltd v. Borry Bernard Edouard Charles Limited And Another [2012] HKCFI 1039 ***(refd)***

Fauziah Ismail & Ors v. Lazim Kanan & Orang-Orang Yang Tidak Diketahui [2013] 7 CLJ 37 CA ***(refd)***

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC ***(refd)***

Madoff Securities International Ltd And Another v. Raven And Others [2012] 2 All ER 634 (Comm) ***(refd)***

Network Pet Products (M) Sdn Bhd v. Royal Canin Sas & Anor [2012] 1 LNS 756 HC ***(refd)***

Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398 ***(refd)***

Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd [1987] 1 LNS 57 HC ***(refd)***

S Nirmala Muthiah Selvarajah, Re: ex p; The New Straits Times Press (M) Bhd [1987] 1 CLJ 413; [1987] CLJ (Rep) 799 HC ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***
World Proteins KFT v. Persons Unknown [2019] EWHC 1146 ***(refd)***
Zarina Sharil & Anor v. Chiong Chuan Hwa & Ors [2008] 1 LNS 538 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 3 r. 5, O. 29 r. 1(2A)(a), (b), (c), (d), (e), (f), (g), (2BA), O. 43, O. 62 r. 5(1), O. 89
Subordinate Courts Act 1948, s. 69(f)

Other source(s) referred to:
Foong's Malaysia Cyber, Electronic Evidence and Information Technology Law, paras [8.098] to [8.100]
McGrath, *Commercial Fraud in Civil Practice*, paras 2.525, 21.07 to 21.48

For the plaintiff - Lee Shih & Pang Huey Lynn; M/s Lim Chee Wee Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] The plaintiff is a victim of a cross-border cyber fraud known as a "push payment fraud" where the victim is tricked over emails to make a payment for a legitimate transaction into a different bank account under the control of the fraudster. Such a fraud has become increasingly common.

[2] In this case, through exchanges of emails, the fraudster (described below as persons unknown) deceived the plaintiff into making payment of EUR 123,014.65 (approximately close to RM600,000) ("plaintiff's monies') into a CIMB bank account in Malaysia. The plaintiff thought it was making a genuine payment to its South Korean counterparty for a commission payment. Instead, the fraudster has now siphoned the plaintiff's monies away.

[3] This CIMB bank account is in the name of the second defendant ie, Premier Outlook Services. The second defendant, Mohammad Azuwan, is the owner of the sole proprietorship of Premier Outlook Services.

[4] This judgment deals with two broad reliefs sought by the plaintiff on an urgent *ex parte* basis *via* a hearing through the e-review platform:

(i) A proprietary injunction and *Mareva* injunction relief against the defendants (encl. 3); and

(ii) Substituted service by way of email and advertisement against the fraudster first defendant (encl. 4).

Background Facts

The Parties

[5] The plaintiff, Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken, is a German company and a manufacturer of speciality chemical products. It has a business arrangement with its representative company in South Korea, KoWorks where KoWorks would sell the plaintiff's products and the plaintiff would make commission payment to KoWorks based on the sales. In the paragraphs below, KoWorks will be referred to as "real KoWorks".

[6] The first defendant, being persons unknown, is a defendant and/or a group of defendants who has infiltrated the email communications between the plaintiff and KoWorks and participated in the fraud to deceive the plaintiff into mistakenly paying the commission into Premier Outlook Services' bank account in Malaysia. In the paragraphs below, where the first defendant was impersonating the plaintiff, he/they will be referred to as "fake plaintiff"; where the first defendant was impersonating KoWorks, he/they will be referred to as "fake KoWorks".

[7] The second defendant, Mohammad Azuwan bin Othman ("Mohammad Azuwan"), is the sole proprietor of Premier Outlook Services ("Premier Outlook"). The plaintiff's monies were paid into Premier Outlook's account in CIMB Bank Berhad ("Premier Outlook's CIMB account").

[8] Kontiinuer Engenharia Industrial ("Kontiinuer") is also a significant party to the fraud. The first defendant had first attempted to deceive the plaintiff into paying the plaintiff's monies into Kontiinuer's bank account in Bank Muamalat Malaysia Berhad ("Kontiinuer's Muamalat bank account").

The First Attempted Fraud

[9] The fraud can be divided into two stages. First, the first defendant had attempted to deceive the plaintiff into paying the plaintiff's monies into Kontiinuer's Muamalat bank account but the attempt failed. Second, the first defendant then successfully deceived the plaintiff into paying the plaintiff's monies into Premier Outlook's CIMB account.

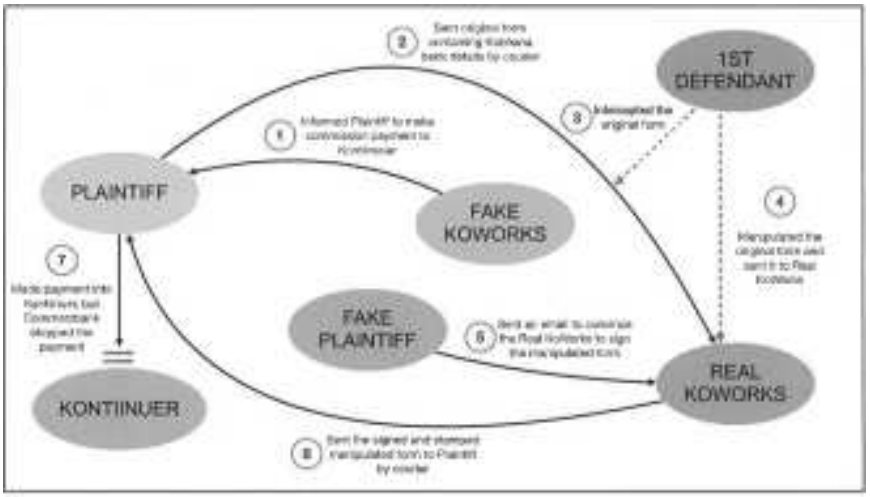
[10] I shall first refer to the fraudulent circumstances where the first defendant had attempted to deceive the plaintiff to pay monies into Kontiinuer's Muamalat bank account.

[11] On 3 September 2020, real KoWorks sent an email with a commission statement to the plaintiff's representative, Mrs Ulrike Diel ("Mrs Diel"), to request for a commission payment of EUR 123,140.65 to be paid into KoWorks' bank account, the Kebhana Bank in Korea.

[12] The first defendant then infiltrated the email communications between the plaintiff and the real KoWorks to execute the fraud.

[13] The actual fraudulent process itself is complicated and would probably become clearer to this court at the trial of this action. But for the present purposes, it suffices to rely on a simplified account of the fraud.

[14] Below is a flowchart to demonstrate the process.



[15] Step 1: On 7 September 2020, the fake KoWorks emailed the plaintiff to request the commission payment to be paid into a bank account in Malaysia due to 'a sudden economic inflation' in Korea. The fake KoWorks provided the details of Kontiinuer's Muamalat bank account.

[16] Under the plaintiff's internal policy, any switch of bank account must be verified by a physical letter signed and stamped by its counterparty and returned to the plaintiff *via* courier.

[17] Step 2: The plaintiff couriered a form to real KoWorks in light of its purported request to transfer the commission payment to a Malaysian bank ("change of bank account form"). The plaintiff had typewritten KoWorks' existing bank details (the Kebhana bank) on the form.

[18] Given the need to procure real KoWorks' real stamp and signature, the first defendant then created two fake email addresses u.diel.zschimmer-schwarz@mail.com and u.dielzschimmer-schwarz@mail.com ("fake email addresses"). The first defendant used the fake email addresses to impersonate Mrs Diel to liaise with real KoWorks. Mrs Diel's genuine email address was u.diel@zschimmer-schwarz.com.

[19] Steps 3, 4 and 5: On 15 September 2020, the fake plaintiff attached the change of bank account form and requested the real KoWorks to sign and stamp the form. The fake plaintiff explained that this was because the commission payment would be paid from the plaintiff's Malaysia bank account. The object at this stage was to mislead the real KoWorks into signing and stamping the change of bank account form although the logic of the email exchanges is not entirely convincing to the court at this stage. What is clear is that the real KoWorks was deceived.

[20] Step 6: The real KoWorks then signed and stamped the change of bank account form and couriered it back to the plaintiff. The change of bank account form stated that the new bank details were Kontiinuer's Muamalat bank account ("Kebhana to Muamalat form").

[21] Step 7: On or about 22 September 2020, the plaintiff received the hardcopy of the Kebhana to Muamalat form and instructed its bank, Commerzbank AG ("Commerzbank") to make the payment of EUR 123,140.65 to Kontiinuer's Muamalat bank account. However, this payment was stopped by Commerzbank prior to 6 October 2020 as further authentication was required.

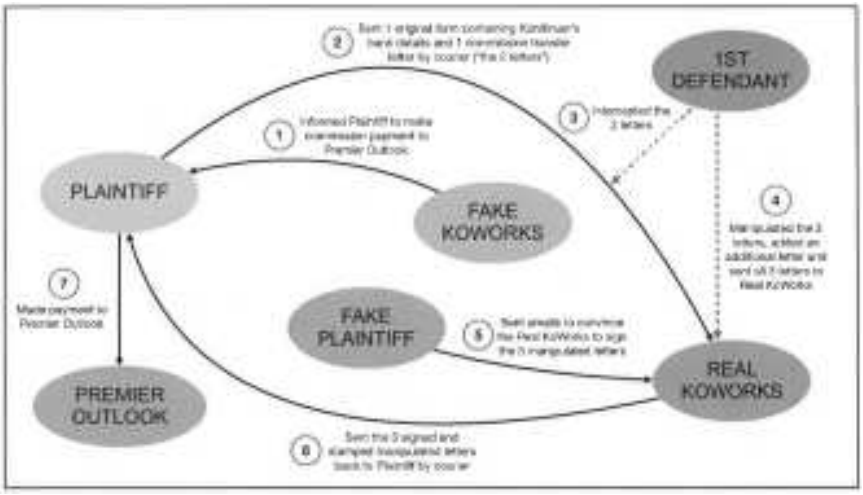
[22] To avoid exposure, fake KoWorks requested that the payment be recalled by the plaintiff and a recall fee of EUR126 was deducted from the commission payment.

[23] The first defendant's first attempt to deceive the plaintiff had failed.

The Second Fraud

[24] The first defendant then moved on to carry out the second stage of the fraud which is set out in the next flowchart.

Second Stage Of The Fraud: Involving Premier Outlook's CIMB Account



[25] Step 1: On 14 October 2020, fake KoWorks attached a fake commission statement to request for payment into Premier Outlook's CIMB account. Similar to para. 15 above, the plaintiff then couriered another change of bank account form (with the existing details being Kontiinuer's Muamalat bank account) and a commission statement directed at Ken Lee of KoWorks for real KoWorks to sign and stamp.

[26] Steps 2 to 5: In order to procure the signature of the real KoWorks, the first defendant again utilised the fake plaintiff to convince the real KoWorks to sign and stamp the couriered letters. Additionally, the fake plaintiff attached another change of bank account form (with the new bank details being Premier Outlook's CIMB account) for real KoWorks to sign and stamp. Again, the logic of the email exchanges is unclear at this stage but the real KoWorks was deceived yet again.

[27] Step 6: real KoWorks then signed, stamped and couriered these letters back to the plaintiff.

[28] Step 7: As a result, on or about 27 October 2020, the plaintiff instructed Commerzbank to make the payment of EUR 123,014.65 into Premier Outlook's CIMB account. A total of RM590,470.32 was then credited into the account on 30 October 2020 and fully transferred out thereafter.

[29] The first defendant had succeeded in deceiving the plaintiff.

Discovery Of Fraud

[30] The fraud was discovered when the real KoWorks informed the plaintiff that it has not received any commission payment. Subsequent investigations were then carried out by the plaintiff, Commerzbank, and the plaintiff's German solicitors.

[31] On 17 November 2020, the plaintiff was informed by Commerzbank that the plaintiff's monies in Premier Outlook's CIMB account had been fully transferred out.

[32] Based on the aforesaid facts, the plaintiff applied for a proprietary injunction and a *Mareva* injunction.

Legal Principles For The Grant Of A Proprietary Injunction

[33] A proprietary injunction is used to preserve and restrain a defendant from dealing with the assets of the plaintiff or with assets in which the plaintiff has an existing proprietary interest in.

[34] Lord Browne-Wilkinson in the House of Lords decision of *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 held that when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient. This is so that the property is recoverable and traceable in equity. The oft-quoted passage from p. 716 of the judgment states:

The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate: as soon as they are mixed with other coins or paid into a mixed bank account they cease to be traceable at law. Can it really be the case, it is asked, that in such circumstances the thief cannot be required to disgorge the property which, in equity, represents the stolen coins? Moneys can only be traced in equity if there has been at some stage a breach of fiduciary duty, ie, if either before the theft there was an equitable proprietary interest (eg, the coins were stolen trust moneys) or such interest arises under a resulting trust at the time of the theft or the mixing of the moneys. Therefore, it is said, a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the assets representing the stolen moneys once the moneys have become mixed.

I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity to restore it: *Stocks v. Wilson* [1913] 2 K.B 235, 244; *R Leslie Ltd v. Sheill* [1914] 3 K.B. 607. Money stolen from a bank account can be traced in equity: *Bankers Trust Co v. Shapira* [1980] 1 W.L.R 1274, 1282C-E: see also *McCormick v. Grogan* (1869) L.R. 4 H.L.82, 97.

[35] McGrath "*Commercial Fraud in Civil Practice*" cited Lord Browne-Wilkinson's view with approval and further commented thus at para 2.525:

Although much of what Lord Browne-Wilkinson had to say in *Westdeutsche* has attracted criticism, few appear willing to depart from his view on the ability to trace in equity stolen monies. It has received the support of *Goff & Jones* (7th edn), Thomas and Hudson, and many other commentators. It is fair to say that the new editorial team of *Goff & Jones* (8th edn), whilst recognising the existence of authority in favour of this proposition, see it, like the text above, as an unfortunate instrumental ending which debases 'the currency of the fiduciary concept' in order to invoke the rules on equitable tracing. Lord Browne-Wilkinson's views are consistent with Lord Templeman's discussion in *Lipkin Gorman v. Karpnale*, particularly where Lord Templeman cited *Banque Beige* pour *L'Etranger v. Hambrouck* as a case based on following trust assets. Banque Beige is a difficult case which can be and has been interpreted many different ways. One interesting issue to arise out of *Banque Beige* is the concern on the part of the Court of Appeal that the arguments raised there as to why no relief could be granted against the mistress who had received from the thief were not to be allowed to hamper the court's ability to find appropriate relief. In *Banque Beige*, Bankes LJ responded to the suggestion that the mistress obtained good title to the stolen monies and such monies could not be traced into the bank account, by the following:

> To accept either of the two contentions with which I have been so far dealing would be to assent to the proposition that a thief who has stolen money, and who from fear of detection hands that money to a beggar who happens to pass, gives a title to the money to the beggar as against the true owner-a proposition which is obviously impossible of acceptance.

Lord Browne-Wilkinson's views on the thief as a fiduciary are consistent with the stance adopted by the High Court of Australia. In *Black v. S Freeman & Co*, O'Connor J stated:

> Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him *bona fide* for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not.

(c) Profits obtained with stolen monies

If, following Lord Browne-Wilkinson, the claimant has a proprietary claim to the stolen monies, does he similarly have such a claim to any profits obtained from the use of those monies? It is suggested that if the claimant is to be permitted to raise a proprietary claim to the stolen monies, logically it should follow that he be entitled to the profits obtained from the use of those monies. Such profits naturally follow a proprietary claim.

[36] The English High Court decision of *AA v. Persons Unknown* [2020] 4 WLR 35 at [61]-[62] sets out the three elements for the grant of a proprietary injunction. The case also involved stolen monies in that it was Bitcoins that had been wrongly transferred out. The court granted the proprietary injunction over the Bitcoins. The elements are:

(i) that the claimant has shown that there is a serious issue to be tried on the merits;

(ii) that the balance of convenience is in favour of granting an injunction; and

(iii) that it is just and convenient to grant the injunction.

[37] Similar principles are mentioned in McGrath '*Commercial Fraud in Civil Practice*' para 21.07 to 21.48 on the principles for a proprietary injunction. Essentially, the *American Cyanamid* principles are to be applied.

[38] However, unlike a *Mareva* injunction, there is no need for the plaintiff to show a risk of dissipation of assets.

Legal Principles For The Grant Of A *Mareva* Freezing Injunction

[39] The principle for granting *Mareva* injunction is rather trite. There are three elements for the grant of a *Mareva* freezing injunction:

(i) The applicant must show that it has a good arguable case;

(ii) That the defendants have assets within jurisdiction; and

(iii) That there is a risk of the assets being removed before judgment could be satisfied.

(Mohamed Azmi SCJ in the Supreme Court case of *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; [1988] 1 MLJ 97.

Court Can Grant Orders Against Persons Unknown (First Defendant)

[40] It is not usually the case that a defendant is described as "persons unknown". Nevertheless, the court can grant interlocutory orders against the first defendant – being persons unknown. In cases like the present which involve cyber fraud and fake email addresses, the fraudster or fraudsters are unknown. English case laws have allowed for similar injunctive orders against "persons unknown". There is nothing in our Rules of Court 2012 that would prevent the writ of summons and applications from being filed against persons unknown.

[41] The present case is not dissimilar to the English High Court decision of *CMOC Sales & Marketing Limited v. Persons Unknown And 30 Others* [2018] EWHC 2230 Comm. In *CMOC* (*ibid*), the fraudsters had hacked into the company's email system. The fraudsters caused the company's bank to pay millions out of its bank account. The persons unknown in that case were defined as a particular class of persons in paras [9] and [10] of the judgment as follows.

> 9. As amended, those persons unknown are defined by reference to the following classes, that is to say those perpetrators of the Fraud (as particularised in the Particulars of Claim) whose identities are currently unknown, including: (1) any person or entity who carried out and/or assisted and/or participated in the Fraud; and (2) any person or entity who received any of the monies misappropriated from the Claimant (including the traceable proceeds thereof) other than in the course of a genuine business transaction with either another defendant or a third party; in either case, other than (i) by way of the provision of banking facilities, and/or (ii) the Non Cause of Action defendants named in Schedule 2 to the Claim Form.
>
> 10. The process of identifying particular named defendants was undertaken essentially by obtaining information and disclosure orders against the banks into which the funds were originally paid from the CMOC accounts, the CMOC accounts, as I say, being with Bank of China in London.

[42] In the present case, a similar definition of the persons unknown in this case has been adopted as set out in para. 2 of the statement of claim:

> (i) Any person or entity who carried out and/or assisted and/or participated in the Fraud;

(ii) Any person or entity who received any of the EUR 123,014.65 misappropriated from the plaintiff (including any traceable proceeds thereof) other than in the course of a genuine business transaction with either another defendant or a third party; and

(iii) In either case of paragraph 2(i) or (ii), other than by way of the provision of banking facilities.

[43] The case of *CMOC* (*supra*) confirmed that the court had the jurisdiction to grant injunctions against persons unknown. At paras. [2] to [4] of the case, HHJ Waksman QC sitting as the High Court Judge held as follows:

Jurisdiction in respect of Persons Unknown as defendants

2. The first question is whether I have jurisdiction to permit the service of the claim form at all here when there is no named defendant. That the court has jurisdiction in general against persons unknown has been confirmed for the purpose of the CPR regime by the case of *Bloomsbury v. News Group Newspaper*, [2003] EWHC 1205 in the judgment of the then Vice-Chancellor, and the key point is that this can be permitted provided that: "... the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person or that there is no further element of subsequent identification whether by way of service or otherwise.

3. That case concerned an application for an interlocutory injunction against those who had been responsible for removing copies of an unpublished Harry Potter book without authority and then offering them for sale to the press. Thus, it is authority that an interlocutory injunction can be granted against persons unknown. The thinking behind that was repeated by Vice Chancellor again in a later injunction case, *Hampshire Waste Services* [2003] EWHC 1738.

4. The novel aspect of this case is that the injunction concerned is a freezing injunction. At this stage I can see no reason in principle against, and indeed a good arguable case for, saying that this should extend to a freezing injunction. If there are potential problems down the line concerning contempt, or there is a need to ensure that there has been proper notification of any relevant defendant of the injunction, that potential difficulty applies as much to the cases where other forms of injunctions against third parties have already been granted. So that is not a good reason not to extend the principle. Conversely, there is a strong reason for extending the principle which is that the freezing injunction can often be a springboard for the grant of ancillary relief in respect of third parties, which arguably could not get off the ground unless there has been a primary freezing injunction. That is very much the case in fraud litigation and is very much the case here where the first object is of course to notify the banks of the freezing injunction so that they can freeze the relevant bank accounts – irrespective of if and when it comes to the attention of the underlying defendants, And then, secondly, on the basis of that, to obtain vital information from the various banks which may assist in

positively identifying some or all of the defendants. And I note that the latest edition of *Gee on Injunctions* takes the same view. See in particular para.17-019 at p.601 at the top of the page. So it seems to me there is at least a good arguable case that the court has jurisdiction to allow the claimants to bring a claim of this kind.

[44] *CMOC* (*supra*) has been referred to approvingly by the Supreme Court in *Cameron v. Liverpool Victoria Insurance Co Ltd* [2019] 3 All ER 1 (SC) at [11]:

> [11] Since this decision, the jurisdiction has regularly been invoked. Judging by the reported cases, there has recently been a significant increase in its use. The main contexts for its exercise have been abuse of the internet, that powerful tool for anonymous wrongdoing; and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context include *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB), [2016] 1 All ER 1006; [2016] 4 WLR 69 and *Smith v. Unknown defendant, Pseudonym 'Likeicare'* [2016] EWHC 1775 (QB); [2016] All ER (D) 224 (Jul) (defamation); *Middleton v. Person Unknown or Persons Unknown* [2016] EWHC 2354 (QB); [2016] All ER (D) 85 (Sep) (theft of information by hackers); *PML v. Person(s) Unknown* [2018] EWHC 838 (QB) (hacking and blackmail); *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm); [2017] All ER (D) 180 (Oct) (hacking and theft of funds). Cases decided in the second context include *Hampshire Waste Services Ltd v. Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9; [2003] All ER (D) 124 (Jul); *INEOS Upstream Ltd v. Persons Unknown* [2017] EWHC 2945 (Ch); [2017] All ER (D) 190 (Nov); *UK Oil & Gas Investments pic v. Persons Unknown* [2018] EWHC 2252 (Ch); [2019] JPL 161; [2018] All ER (D) 14 (Sep). In some of these cases, proceedings against persons unknown were allowed in support of an application for a *quia timet* injunction, where the defendants could be identified only as those persons who might in future commit the relevant acts. The majority of the Court of Appeal followed this body of case law in deciding that an action was permissible against the unknown driver of the Micra who injured Ms Cameron. This is the first occasion on which the basis and extent of the jurisdiction has been considered by the Supreme Court or the House of Lords.

[45] At para. 13 of the judgment, Supreme Court confirmed that cases can be brought against anonymous defendants who are identifiable but whose names are unknown. The defendant must be described in a way that makes it possible in principle to locate or communicate with him. This was what Lord Sumption said:

> [13] In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises

> defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.

[46] *CMOC* (*supra*) has also been applied in other fraud cases carried out by anonymous fraudsters.

[47] In *World Proteins KFT v. Persons Unknown* [2019] EWHC 1146 (QB), emails which impersonated employees of a Dutch supplier were sent to deceive the applicant. The defrauded applicant then made transfers of amounts owing to the Dutch supplier into an account at Barclays. The applicant later discovered that the account did not belong to the Dutch supplier. The English High Court granted an *ex parte* injunction and continued the injunction.

[48] In *AA v. Persons Unknown* [2020] 4 WLR 35, the hackers encrypted a company's computer system. Ransom was paid and Bitcoins were paid into a particular exchange account. The English High Court granted a proprietary injunction to restrain the Bitcoin account. The persons unknown defendants were "persons unknown who demanded Bitcoin on 10 and 11 October 2019" and "persons unknown who holds/controls 96 Bitcoins held in a specified Bitfinex Bitcoin address".

[49] As stated above, there is nothing in our Rules of Court 2012 prohibiting the making of an order against persons unknown. In fact, O. 89 of the Rules of Court 2012 for summary proceedings for possession of land allows for a defendant reference to persons unknown. [See *Fauziah Ismail & Ors v. Lazim Kanan & Orang-Orang Yang Tidak Diketahui* [2013] 7 CLJ 37 (CA); the commentary in *Foong's Malaysia Cyber, Electronic Evidence and Information Technology Law*, para [8.098] to [8.100]].

[50] The plaintiff merely needs to establish a good arguable case for the court to apply the persons unknown jurisdiction. This is so held in *CMOC v. Persons Unknown* [2017] EWHC 3599 (Comm) where the English High Court applied the test of a good arguable case to grant the *Mareva* freezing injunction against persons unknown.

[51] In the said case, the initial claim was only against a single defendant of persons unknown. At the trial, the claim expanded to more than 30 defendants. Similarly, learned counsel for the plaintiff anticipates the need to amend and add other defendants to this action. The plaintiff is already applying for third party discovery against the banks to trace the plaintiff's monies and the recipients of those monies.

A **Grounds for Proprietary Injunction**

Serious Issue To Be Tried

[52] The plaintiff was deceived into paying the plaintiff's monies into the second defendant's CIMB account (in the name of Premier Outlook). The
B plaintiff was deceived into thinking the plaintiff was paying the real KoWorks.

[53] Applying *Westdeutsche* (*supra*), the plaintiff can assert a constructive trust claim over the monies. There is at least a serious issue to be tried that the plaintiff's proprietary interest should be preserved by this proprietary
C injunction.

[54] The plaintiff is also seeking an account of profits – the profits obtained from the use of the plaintiff's monies. Such profits are said to naturally follow a proprietary claim.

D *Balance Of Convenience In Favour Of Proprietary Injunction*

[55] The court accepts that the balance of convenience is in favour of the grant of the proprietary injunction. These are the plaintiff's monies that were paid out under a false premise. These monies should be injuncted pending the determination of the full writ action.

E *Just And Convenient*

[56] In these circumstances, I agree that it is just and convenient to grant the proprietary injunction.

Court Can Grant Parallel Proprietary Injunction And Mareva Freezing Injunction

F

[57] The court can grant parallel reliefs of a proprietary injunction and a *Mareva* freezing injunction. This is also often done in fraud cases.

[58] There is a difference between the two remedies. A *Mareva* freezing injunction is designed to protect a claimant against dissipation of assets which
G he might execute judgment against. A proprietary injunction is to preserve assets which a claimant has a proprietary claim. These assets can then be turned over to the claimant if he is successful in the action.

[59] If a case is needed on the differences between the two forms of injunction, one can turn to the Hong Kong court of first instance case of
H *Falcon Private Bank Ltd v. Borry Bernard Edouard Charles Limited And Another* [2012] HKCFI 1039 at [77] and [78] which explained these differences. The Hong Kong court maintained both the proprietary injunction and the *Mareva* freezing injunction.

[60] Similar position can also be seen in the cases of *Madoff Securities*
I *International Ltd And Another v. Raven And Others* [2012] 2 All ER 634 (Comm) and *Abdullah Nasser Obaid And Others v. Khalid Abdullah AI-Hezaimi* [2018] EWHC 243 (Ch) where the court maintained both the proprietary injunction and the *Mareva* freezing injunction.

Grounds For *Mareva* Injunction

Good Arguable Case

[61] The threshold for a "good arguable case" is one which is more than barely capable of serious argument but not necessarily one which has to be better than 50% chance of success. This threshold has been set out in the English Court of Appeal decision of *Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 and as applied by the Singapore Court of Appeal in *Amixco Asia Pte Ltd v. Bank Negara Indonesia 1946* [1992] 1 SLR 703.

[62] There is a good arguable case that the plaintiff did wrongly pay out the plaintiff's monies into the CIMB bank account under false pretences. The plaintiff was deceived into thinking it was paying the real KoWorks. This is similar to the facts of *World Proteins* (*supra*) and applying the House of Lords decision of *Westdeutsche*, (*supra*) a constructive trust arises from such stolen monies.

[63] There is also a good arguable case that the plaintiff is entitled to seek an account of profits against the defendants for any profits that were obtained through the use of the plaintiff's monies.

Assets Within The Jurisdiction

[64] The second defendant is a Malaysian citizen with a Malaysian residential address. He is also the sole proprietor of Premier Outlook which has its business listed as repairing electrical equipment. The second defendant is likely to have assets in the jurisdiction personally and/or by virtue of his business.

[65] It is arguable that the first defendant will also have assets within the jurisdiction. This is because the first unsuccessful attempt to deceive the plaintiff involved the use of another Malaysian bank account in Bank Muamalat.

Risk Of Dissipation Of Assets And Lack Of Probity

[66] There is already actual dissipation of assets. After the plaintiff's monies of EUR 123,014.65 were transferred into Premier Outlook's account on 30 October 2020, the plaintiff was informed that these monies have been fully transferred out.

[67] Further, when assessing whether there is a risk of assets being removed, a lack of probity and honesty can be determinative in concluding that there is such a risk of dissipation (see the Court of Appeal decision in *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893; [1995] 2 MLJ 83). Here, there is such lack of probity and honesty: fake email addresses were used by the first defendant to deceive KoWorks and the plaintiff.

[68] The following types of conduct justify a finding that there is a risk of dissipation of assets:

(i) Conduct which is "lacking in probity and honesty'' (Court of Appeal decision of *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893; [1995] 2 MLJ 83;

(ii) Where there is "solid evidence that the probity of the defendant could not be relied on" (High Court decision of Peh Swee Chin J in *Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1987] 1 LNS 57; [1988] 2 MLJ 261);

(iii) There is "*prima facie* dishonest conduct" (Singapore Court of Appeal decision in *Amixco Asia Pte Ltd v. Bank Negara Indonesia 1946* [1992] 1 SLR 703); and

(iv) The "illegal conduct" of the defendants "imputes dishonesty giving rise to a real danger of dissipation" (High Court decision in *Zarina Sharil & Anor v. Chiong Chuan Hwa & Ors* [2008] 1 LNS 538; [2009] 2 MLJ 124 (see para. 50)).

Compliance With Order 29 Rule 1(2A) Of The Rules of Court 2012

[69] The plaintiff has met the requirements under O. 29 r. 1(2A) of the Rules of Court 2012.

[70] Order 29 r. 1(2A)(a) and (b): The affidavit in support sets out the facts giving rise to the claim and the injunctions application.

[71] Order 29 r. 1(2A)(c): There is a need to proceed *ex parte*. In light of the defendants' dishonest conduct in directing this fraudulent scheme, notice has not been given to the defendants. Any notice would result in them likely to dissipate their assets or become flight risks to frustrate this application. Further, notice cannot be given to the first defendant whose identity is currently unknown.

[72] Order 29 r. 1(2A)(d) and (e): Concerning any answer that may be given by the second defendant, the plaintiff mentioned that firstly, he may assert that he was unaware that the plaintiff's monies were paid into Premier Outlook's bank account. However, such denial of knowledge would be untenable given that the second defendant has to be in control of Premier Outlook's bank account as its sole proprietor. Further, it is also common banking practice for banks to contact their clients to verify any large payments being made into their bank accounts, especially in the case of foreign funds.

[73] Secondly, the defendants may assert that the High Court has no jurisdiction over this suit. This is because the monetary limit of this suit falls within the jurisdiction of the Sessions Court. However, this suit seeks for a relief for account of profits which the Sessions Court has no jurisdiction over.

[74] Section 69(f) of the Subordinate Courts Act 1948 provides that the Sessions Courts shall have no jurisdiction in civil suits and proceedings related to "accounts". In the High Court case of *Chong Kean Cheong & Anor v. In Ex Hale Sdn Bhd & Ors* [2018] 1 LNS 96, the definition of "accounts" is linked to O. 43 of the Rules of Court 2012 for an action of account of profits.

[75] The plaintiff is seeking the relief of an account of profits at para. 82(1) of the statement of claim. The High Court has the exclusive jurisdiction to consider and to grant this relief.

[76] Order 29 r. 1(2A)(f): There is no other similar application made to another judge.

[77] Order 29 r. 1(2A)(g): The plaintiff has set out the precise relief in the affidavit in support and the notice of application for the *Mareva* and proprietary injunctions.

Compliance with Stringent Standards: English Practice Direction

[78] Following the guidance in the Court of Appeal decision of *Arthur Anderson & Co v. lnterfood Sdn Bhd* [2005] 2 CLJ 889; [2005] 6 MLJ 239 and the High Court decision in *Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* [1997] 5 CLJ 307; [1997] 5 MLJ 77, the plaintiff has strived to meet the stringent requirements as set out in the cases as well as the *English Practice Direction For Mareva And Anton Piller Orders* [1994] 4 All ER 52.

[79] The plaintiff has incorporated the necessary guidelines and safeguards in the order for a *Mareva* freezing injunction in this application.

Extension Of Time For Service Of *Ex Parte* Order

[80] Order 29 r. 1(2BA) of the Rules of Court 2012 provides that an *ex parte* order must be served within seven days of the date of order, however O. 3 r. 5 of the Rules of Court 2012 gives the court the power and discretion to extend the time of service. Given the difficulty and delay involved in effecting service on the first defendant, this court grants an extension of time to serve the *ex parte* order of the *Mareva* and proprietary injunctions on the defendants within 12 days of the date of order (see the High Court decision in *Network Pet Products (M) Sdn Bhd v. Royal Canin Sas & Anor* [2012] 1 LNS 756 at p. 4 where the court granted an extension of 14 days to serve the *ex parte* injunction order sought in the case).

Substituted Service On First Defendant

[81] I accept that there are grounds in support of an order for substituted service against the first defendant by way of email and advertisement. It is impracticable to effect personal service on the first defendant being persons unknown.

[82] Order 62 r. 5(1) of the Rules of Court 2012 provides that the court may make an order for substituted service of a document requiring personal service if personal service is impracticable.

[83] In the High Court case of *S Nirmala Muthiah Selvarajah, Re: ex p; The New Straits Times Press (M) Bhd* [1987] 1 CLJ 413; [1987] CLJ (Rep) 799; [1988] 2 MLJ 616 ("*Re S Nirmala*"), at pp. 617 and 618 (MLJ), the court held that the Practice Note No 1 of 1968 has no application to a defendant whose whereabouts are unknown. The proposed methods of substituted service should be those that would most likely bring the proceedings to the notice of the defendant.

[84] In this case, the plaintiff is seeking to effect service on the first defendant through the only known communication method with the first defendant. That is, by sending emails to the two fake email addresses (u.diel.zschimmer-schwarz@mail.com and u.dielzschimmer-schwarz@mail.com) that were used by and in the control of the first defendant.

[85] The plaintiff is also seeking to effect service by inserting an advertisement in the local newspaper, "The New Straits Times".

[86] These are the two most practicable methods that would most likely bring the proceedings to the notice of the first defendant.

[87] There is nothing to prevent the court from granting an order for substituted service by way of email. The High Court of Kuala Lumpur previously granted such an order. See the order dated 22 January 2018 in the Kuala Lumpur High Court Suit No. WA-221P-50-12/2017:

> (3) menyampaikan sesalinan Writ berserta dengan Pernyataan Tuntutan dalam tindakan ini dan sesalinan Perintah Untuk Penyampaian Ganti yang dibuat atas pendengaran permohonan ini kepada Defendan melalui:
>
> (i) mesej WhatsApp defendan di nombornya 0132727957; dan/atau
>
> (ii) emel defendan di norfarahkam.ilah94@outlook.com:
>
> Order dated 22.1.2018 in the Kuala Lumpur High Court Suit No. WA-22/P-50-1212017

[88] Further, the plaintiff also seeks to include a link to an online Dropbox folder in the email sent to the first defendant. This is because the plaintiff may not be able to attach all the cause papers through email due to the large file sizes. By uploading the soft copies onto the online Dropbox folder, it would enable the first defendant to have more convenient access to the cause papers. A similar system was deployed in the High Court case of *CMOC* (*supra*).

[89] Finally, the plaintiff is seeking to fix the deemed date of service of the relevant cause papers on the first defendant seven days after the date of the relevant email and/or advertisement. This is largely due to the time limit to serve the *ex parte* orders of *Mareva* and proprietary injunction (see *Re S Nirmala* at p. 618 where the High Court allowed such a provision of seven days).

[90] Based on the aforesaid, this court also grants the plaintiff's prayers as sought in encls. 3 and 4.